Collier Shannon Scott

Collier Shannon Scott, PLLC
Washington Harbour, Suite 400
3050 K Street, NW
Washington, DC 20007-5108
202.342.8400 TEL
202.342.8451 FAX

David E. Frulla
Member of the Firm
202.342.8648
DFrulla@colliershannon.com

WRITTEN STATEMENT OF DAVID E. FRULLA
prepared for the
SUBCOMMITTEE ON FISHERIES AND OCEANS,
U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON RESOURCES

Mr. Chairman, and Members of the Subcommittee, thank you for providing me this opportunity to present my views on the intersection between federal fisheries management laws and more general environmental laws, such as the National Environmental Policy Act ("NEPA").

I am an attorney in private practice in Washington, D.C. with Collier Shannon Scott, PLLC. I have represented associations of commercial fishermen from across the country, including in New England and the Mid-Atlantic, Alaska, and the Gulf of Mexico and Caribbean, since the early 1990's. I have litigated cases involving the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"), Regulatory Flexibility Act, Endangered Species Act ("ESA"), and NEPA. In certain of these cases, my clients have opposed NOAA Fisheries. However, in the NEPA context, we have generally supported agency decision-making. We have prevailed in the half-dozen-plus NEPA cases in which we have been involved on NOAA Fisheries' side. I have also been retained to provide testimony to the North Pacific Fishery Management Council on NEPA's intersection with the Magnuson-Stevens Act.

I do not believe that anyone here today disagrees with the general premise that NOAA Fisheries should, as NEPA requires, take a "hard look"[1] at the wide range of impacts on the human environment of the consequences of its fishery management programs. The Magnuson-Stevens Act itself mandates consideration, via its national standards and other required and optional provisions for fishery management plans, of a wide range of environmental factors.[2] In response to a handful of court decisions, most occurring at or around 2000, NOAA Fisheries, guided by its Office of General Counsel, made NEPA compliance, or perhaps over-compliance, a priority.

---

[1] *NRDC v. Hodel*, 865 F.2d 288, 294 (D.C. Cir 1988).

[2] For instance, in a NEPA case, U.S. District Court Judge Gladys Kessler explained, "[NOAA Fisheries has] numerous—and oftentimes competing—statutory objectives to contend with in managing the New England waters; preservation of essential fish habitat is only one of many." *Conservation Law Foundation v. Mineta*, 131 F. Supp. 2d 19, 27 (D.D.C. 2001). These measures are also subject to the substantive and procedural requirements of the ESA, the Marine Mammal Protection Act, the Coastal Zone Management Act, the Regulatory Flexibility Act, the Paperwork Reduction Act, and various executive orders governing rulemaking, in addition to NEPA.

Meticulous NEPA compliance is no small task. According to the Commerce Department's latest *Semi-annual Regulatory Agenda*, NOAA Fisheries had approximately seventy-five actions from the regional fishery management councils at the proposed rule stage alone,[3] not to mention long-term on-going rulemaking proceedings. The question presented today, however, is whether NEPA, as NOAA Fisheries is currently implementing it, fosters or impedes timely, high quality federal fisheries management. The record is equivocal at best.

NEPA is a procedural statute. It imposes no substantive conservation obligations.[4] That said, the environmental community has often used NEPA as a litigation device to attempt to force a substantive reconsideration of an agency action with which it did not agree. Accordingly, there are two elements of NEPA that should concern the Subcommittee: (1) whether it serves as an effective independent mechanism to ensure quality agency decision-making; and (2) whether it actually also serves to improve the quality of NOAA Fisheries decision-making. Regarding the first point, the litigation record shows that NEPA is, quite simply, over-rated as an enforcement tool. As to the latter, I submit that a wide array of substantive statutes independently help to ensure environmentally-aware decision-making. In fact, NEPA obligations may actually inhibit timely, science-based management.

I will address these two points in order. There is a more refined question than NOAA Fisheries' (improving) won-lost record in NEPA cases that the Subcommittee should consider in determining NEPA's independent value as an enforcement tool. It is whether these NEPA violations occurred in the context of agency actions that were flawed under the substantive environmental laws. If so, then NEPA, as an independent enforcement tool, is not necessarily adding much to the application of Administrative Procedure Act decision-making standards to the substantive fisheries management standards contained in the Magnuson-Stevens Act.

Environmental plaintiffs have prevailed in recent years on NEPA claims regarding federal fisheries management in approximately a half-dozen contexts.[5] However, our research has identified only one of these contexts in which an environmental plaintiff prevailed on a NEPA claim when it did not prevail on a Magnuson-Stevens Act based claim in the same case: *American Oceans Campaign v. Daley* ("*AOC*").[6] A similar perspective obtains in the Endangered Species Act context.[7]

---

3 69 Fed. Reg. 72974, 72978-81 (Dec. 13, 2004).

4 *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-51 (1989).

5 These include the Pacific groundfish fishery, the Alaska groundfish fishery, the Hawaii longline fishery, the Hawaii lobster fishery, the Magnuson-Stevens Act's essential fish habitat ("EFH") requirements, and the Pacific salmon fishery.

6 183 F. Supp. 2d 1 (D.D.C. 2000).

7 For instance in *Greenpeace v. NMFS*, 55 F. Supp. 2d 1248 (D. Wash. 1999), the court held that the agency had violated NEPA by not preparing a programmatic environmental impact

The *AOC* case is worthy of review. It addressed NOAA Fisheries' efforts to comply with the essential fish habitat provisions of the 1996 Sustainable Fisheries Act ("SFA").[8] An environmental plaintiff challenged essentially all the regional fishery management councils' EFH plans. Most if not all of the plans concluded that, within the two year time limit the SFA and NOAA Fisheries guidelines had set to develop a plan, there was not sufficient information to warrant adopting habitat-specific measures in order to protect EFH from the adverse impacts of fishing gear in addition to the fishery management regimes then in place. While the court found the councils' decisions in this regard were reasonable as a matter of substance (in the main, because there was little information at that time on which to act), the court then concluded the councils failed to consider a sufficient array of alternatives under NEPA because they only considered their current management measures, *versus* having done nothing at all. Since then, all the councils have developed more comprehensive EFH plans under a *circa* four-year time table set forth in a post-judgment settlement agreement entered in that case.

As it embarks on the re-authorization process, however, the Subcommittee should consider whether the councils' and NOAA Fisheries' failure to comply with NEPA in the EFH context was actually the result of flawed decision-making that requires NEPA as an enforcement mechanism. Another explanation for the failure in this singular instance may be that the SFA and NOAA Fisheries in its EFH implementation guidelines simply did not provide the councils and the agency itself sufficient time and resources to develop the necessary range of practicable alternatives that would have complied with the SFA's EFH mandate. The Magnuson-Stevens Act's practicability requirement for EFH measures does require reasonable precision in decision-making.[9] Congress needs to be careful about mandating any additional substantive and

---

("Continued")
statement for the Alaska groundfish fisheries, but that holding was made in conjunction with a substantive determination under the ESA that the agency had failed to consider adequately reasonable and prudent alternatives to protect Steller sea lions. Two times, a court did conclude the agency had not violated the Endangered Species Act, but failed to comply with NEPA because it had not recently prepared an environmental impact statement. *Leatherback Sea Turtle v. NMFS*, 1999 U.S. Dist. LEXIS 23317 (D. Haw. 1999); *Ramsey v. Kantor*, 96 F.3d 434 (9th Cir. 1996). These types of issues can be addressed by ensuring that the fishery management process includes some measure of reflection and does not simply react from year to year.

[8] *See* 16 U.S.C. §§ 1853(a)(7) & 1855(b)(1)(A).

[9] 16 U.S.C. § 1853(a)(7)(practicability requirement). A federal court recently explained in upholding the New England Council's new EFH measures implemented in connection with its groundfish rebuilding plan amendment:

> Similarly, the range of alternatives that the Secretary should have considered here is not defined solely in terms of percentage of EFH areas that are closed, but rather must include a variety of forms of closures in combination with other EFH protection methodologies, as well. Of course, the range of alternatives warranting consideration is also defined in terms of the regulatory

analytical requirements that it imposes on NOAA Fisheries in this re-authorization process. Care in legislating new requirements and their timelines may thus serve a more vital function in ensuring quality decision-making by NOAA Fisheries than NEPA.

The second question is whether NEPA actually improves the quality of agency decision-making. A major issue here is one of timing. The Magnuson-Stevens Act imposes its own timelines which ostensibly require prompt council and agency decision-making.[10] Often in my experience, fisheries management decisions are delayed as the councils and NOAA Fisheries struggle to finalize and implement their rule-making packages, that now often-times approach or exceed one thousand pages. The Atlantic scallop fishery in which I am involved represents an example. In that fishery, despite the resource being rebuilt ahead of schedule, annual management measures subject to rulemaking are very often not able to be implemented at the start of the fishing season.[11]

Moreover, the scallop fishery recently embarked on a new, adaptive area-based management system, in which the goal is to distribute scallop fishing across the resource in a way that directs the fleet to relatively large concentrations of mature scallops, while allowing new "sets" of juvenile scallops to grow to maturity. However, scallops can be fast-growing, and new concentrations of juvenile scallops can appear unexpectedly in the middle of the fishing year. It is an open question whether the management process, burdened as it is with procedural requirements, can be sufficiently nimble to allow for the effective implementation of adaptive, area-based management. Scallops are not the only example of fast-growing species that require prompt management; certain-federally managed squid species found in the Mid-Atlantic generally live for less than a year.

("Continued")

> action's purpose. . . , and therefore options that are inconsistent with the [Magnuson-Stevens Act] need not be considered.

Oceana v. Evans, Civ. No. 04-811-ESH, slip op. at 63 (D.D.C., Mar. 9, 2005) (citation omitted).

[10] 16 U.S.C. § 1854 (a)-(b) (imposing detailed procedural requirements and timelines for development and promulgation of fishery management council plans, amendments, and implementing regulations).

[11] For instance, Scallop Framework Adjustment 14 governing the 2001 and 2002 fishing years was not implemented until well into the fishing season because NFMS decided to undertake an environmental impact statement-level review for this bi-annual adjustment measure, in the wake of the NEPA litigation in 2000. 66 Fed. Reg. 24052 (May 11, 2001). In addition, largely due to purported procedural requirements, NMFS was not able to provide timely access to a highly-abundant scallop area near Georges Bank, called the Nantucket Lightship Access Area, until the heavy weather months from November 2004 through January 2005. 69 Fed. Reg. 63460 (Nov. 2, 2004). The truncated season presented a safety issue and contributed to the limited use of the access program.

All fisheries are facing these challenges to some degree. Most NOAA surveys occur in the temperate months, and it is a challenge – and an increasingly unmet one, at that – to ensure that the rulemaking process can happen swiftly enough to allow this new information to govern the fishery for the next fishing season. More often, fisheries have to be managed on older survey data. It is an open question whether this represents the best we can do to ensure that federal fisheries are managed according to the "best scientific information available," as Magnuson-Stevens Act National Standard Two provides.[12]

Finally, it will be worth considering whether NEPA's requirement to ensure the development and consideration of a wide range of alternatives promotes flexible fishery management council decision-making. On the East Coast, many proposed fishery management programs (whether amendments or framework adjustments) address a wide range of subjects. If alternatives need to be developed and then analyzed for each permutation of possible outcomes, the analytical task becomes insuperable. For its part, the New England Council is seeking to cope with the analytical burden by artificially limiting its ability to "mix and match" the final suite of recommended alternatives. While that approach may simplify procedural compliance in analyzing alternatives, it may limit a council's ability to strike the needed "delicate and nuanced balance … between its duties to maximize OY [optimum yield] among all managed species while rebuilding overfished stocks and to concurrently minimize harm to fishing communities."[13] Procedural obstacles should not constrain constructive management efforts in this way.

We look forward to assisting the Subcommittee in addressing these important issues as the Magnuson-Stevens Act re-authorization process proceeds.

Dated: April 12, 2005

---

[12] 16 U.S.C. § 1851(a)(2).

[13] *Oceana v. Evans*, *supra,* slip op. at 32 (upholding nearly all elements of New England Fishery Management Council's rebuilding plan for Northeast multispecies).